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# In the Supreme Court of the United States

OCTOBER TERM, 1980

GEORGE F. JEWETT, JR.
and
LUCILLE M. JEWETT,
PETITIONERS,

*v.*

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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I

## Questions Presented For Review

1. Is a disclaimer of a contingent remainder interest under a trust, made during the lifetime of the life beneficiary, a taxable transfer for federal gift tax purposes?

2. Under Treasury Regulation §25.2511-1(c) does the "reasonable time" for disclaimer of a contingent remainder interest begin to run from the date of creation of the remainder interest or from the date of death of the life beneficiary?

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COMMISSIONER OF INTERNAL REVENUE,
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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners George F. Jewett, Jr. and Lucille M. Jewett respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 9, 1980.

### Opinions Below

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 638 F.2d 93 (9th Cir. 1980), 47 AFTR 2d 151, 212, and is attached hereto as

Appendix pages A-1 through A-6. The opinion of the United States Tax Court is reported at 70 T.C. 430 (1978), CCH Tax Ct. Dec. 35,213 (1978), and is attached hereto as Appendix pages A-7 through A-19, as amended by Order attached hereto as Appendix pages A-23 through A-25.

## Jurisdiction

The judgment of the United States Court of Appeals for the Ninth Circuit was rendered and entered on December 9, 1980. A petition for rehearing was denied by Order entered on February 18, 1981. The jurisdication of this Court is invoked pursuant to 28 U.S.C §1254(1).

## Statutes And Regulations

### I.R.C. §2501. Imposition of Tax.

(a) TAXABLE TRANSFERS. —

(1) GENERAL RULE. — A tax, computed as provided in section 2502, is hereby imposed for each calendar quarter on the transfer of property by gift during such calendar quarter by any individual, resident or nonresident.

* * *

### I.R.C. §2511. Transfers in General.

(a) SCOPE. — Subject to the limitations contained in this chapter, the tax imposed by section 2501 shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; but in the case of a nonresident not a citizen of the United States, shall apply to a transfer only if the property is situated within the United States.

* * *

Treasury Regulation §25.2511-1 (c), 26 C.F.R. §25.2511-1(c): The text of 26 C.F.R. §25.2511-1(c) is set forth at Appendix page A-30.

## Statement Of The Case

### 1. Statement of Facts

The testatrix died on January 14, 1939, leaving a will which created a trust for the benefit of her husband during his lifetime and thereafter for the benefit of her son and her daughter-in-law (George F. Jewett, Jr.'s mother) during their lifetimes (A-21). On the death of the survivor of the son and daughter-in-law the will directs distribution of the remainder to the then-living children of the son; the share of any then-deceased child is to be distributed to the child's issue.

Two of the life beneficiaries died prior to 1972. (A-21) The remaining life beneficiary, the mother of petitioner George F. Jewett, Jr. (hereinafter "Jewett"), is still living. (A-21)

Under the trust Jewett becomes entitled to a share of the trust remainder only if he survives his mother.

In 1972, while his mother was still alive, Jewett executed disclaimers of his contingent remainder interest in the trust (A-21 — A-22). Those disclaimers were unequivocal and effective under state law. (A-3)

Jewett and his wife disclosed the disclaimers on their 1972 United States Gift Tax Returns, but did not report them as taxable transfers for federal gift tax purposes. (A-10)

In February 1976, the Internal Revenue Service issued Notices of Deficiency asserting that the disclaimers were taxable transfers. (See A-10—A-11)

2. PROCEEDINGS BELOW

On May 5, 1976, petitioners filed a Petition in the United States Tax Court for the redetermination of the deficiencies determined by the I.R.S. Jurisdiction in the Tax Court existed pursuant to 26 U.S.C. §7442 and §6213. That Petition alleged that the Notices of Deficiency erroneously determined that the disclaimers were taxable transfers for federal gift tax purposes.

On June 13, 1978, the Tax Court filed an Opinion (A-7) holding that Jewett's disclaimers were taxable transfers for federal gift tax purposes. The Tax Court conceded that the disclaimers were unequivocal and effective under state law (A-12), but asserted that they were not timely under Treasury Regulation §25.2511-1(c), because the "reasonable time" provision of that Regulation must be measured from the date of death of the testatrix (in 1939) rather than from the date of the death of the life beneficiary (who is still living) (A-14, A-15).

Petitioners filed a Motion for Reconsideration, which was denied on July 19, 1978 (A-26). Also on July 19, 1978, the Tax Court issued an Order amending its July 13, 1978 Opinion in certain respects, without changing the result (A-23).

On August 17, 1978, Decision was entered by the Tax Court in accordance with its Opinion of June 13, 1978, as amended (A-27).

On November 13, 1978, Appellants filed their Notice of Appeal to the Court of Appeals for the Ninth Circuit.

In an Opinion filed on December 9, 1980, from which one Judge dissented (A-6), the Court of Appeals for the Ninth Circuit affirmed the decision of the Tax Court (A-1), stating that a disclaimer of a contingent remainder interest must be made within a reasonable time after knowledge of the transfer to the disclaimant. It held that the relevant "transfer" was the creation of the contingent remainder interest (by the death of the testatrix 33 years before) rather than possible transfer of the

trust property to Jewett upon the death of the life beneficiary (which event had and has not occurred). In so holding the Opinion expressly disagreed with the decision of the United States Court of Appeals for the Eighth Circuit in *Keinath v. Commissioner*, 480 F.2d 57 (8th Cir. 1973). (A-4).

On December 19, 1980, petitioners filed a motion for rehearing and suggestion for rehearing *en banc*. That motion was denied on February 18, 1981. (A-29)

## Reasons For Granting The Writ

### I. The Decision of the Court of Appeals for the Ninth Circuit Expressly Contradicts Prior Decisions of the Court of Appeals for the Eighth Circuit and Results in Nonuniform Application of Federal Tax Law.

The decision of the Court of Appeals for the Ninth Circuit directly and expressly contradicts the only other Circuit Court of Appeals authority in point, the decisions of the Eighth Circuit in *Keinath v. Commissioner*, 480 F.2d 57 (8th Cir. 1973) and *Cottrell v. Commissioner*, 628 F.2d 1127 (8th Cir. 1980) (*en banc*). In those discussions, the Eighth Circuit held that the "reasonable time" provision of Treasury Regulation 25.2511-1(c) must be computed from the date of death of the life beneficiary and not from the date of the creation of the remainder interest.

A transfer or gift presupposes that the donor possesses property. In contrast, disclaimer is a refusal to *accept* the ownership of property or property rights. *Bel v. United States*, 452 F.2d 683, 693 (5th Cir. 1971); *City National Bank & Trust Co. v. United States*, 203 F. Supp. 398, 402 (S.D. Ohio 1962) aff'd, 312 F.2d 118 (6th Cir. 1963), *cert. denied*, 373 U.S. 949 (1963). A disclaimer occurs prior to ownership.

Treasury Regulation §25.2511-1(c) recognizes this fundamental difference between a refusal to accept property *ab initio* and the disposition of property already owned:

> "(c) .... Where the law governing the administration of the decedent's estate gives a beneficiary ... a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent ... a refusal to accept ownership does not constitute the making of a gift if the refusal is made *within a reasonable time after knowledge of the existence of the transfer.* The refusal must be unequivocable [sic] and effective under the local law. There can be no refusal of ownership of property after its acceptance. .... In the absence of facts to the contrary, if a person fails to refuse to accept a *transfer to him of ownership of a decedant's property* within a reasonable time after learning of the existence of the transfer, he will be presumed to have accepted the property...." (emphasis added)

The central issue in this case is whether the computation of the "reasonable time" allowed by the Regulation is from the establishment of a trust identifying the taxpayer as having a contingent remainder interest, or from the death of the life beneficiary, when ownership of the trust property passes to the taxpayer. As noted above, that precise issue was decided by the Court of Appeals for the Eighth Circuit in 1973, in *Keinath v. Commissioner*, 480 F.2d 57 (8th Cir. 1973).

In that case, 19 years after the death of the testator but less than six months after the death of the life beneficiary, a remainderman filed a disclaimer of his interest which was held timely and valid under state law. As in this case, the Commissioner contended that the disclaimer constituted a taxable transfer for federal gift tax purposes because the taxpayer failed to disclaim within a "reasonable time" after the death of the testator. The Tax Court agreed, 58 T.C. 352 (1972). However, on appeal the Eighth Circuit reversed and held that the "reasonable time" period commences on the death of the life beneficiary, and that the taxpayer's disclaimer was filed within a "reasonable time" after her death. In doing so it adopted the reasoning behind the common law rule that a disclaimer can be made after the death of the life beneficiary:

> [T]he holder of a vested remainder interest subject to divestiture has a *reasonable time* within which to renounce or disclaim the remainder interest *after the death of the life beneficiary* and that an unequivocal disclaimer filed within six months thereof is made within a reasonable time .... In the instant case the remainderman ... had really nothing to accept or renounce by way of beneficial ownership or control of the property until he succeeded in outliving the life beneficiary .... 480 F.2d at 64 (emphasis added.)

The *Keinath rule* was recently reaffirmed by the Eighth Circuit, sitting *en banc, in Cottrell v. Commissioner*, 628 F.2d 1127 (8th Cir. 1980), where the Court found that the facts of the case were "indistinguishable in any material respect" from *Keinath* and that *Keinath* was controlling. *Id.* at 1128.

In the instant case, the Ninth Circuit has expressly rejected the rule established by the Eighth Circuit in *Keinath* and reaffirmed in *Cottrell*. After discussing *Keinath*, the Ninth Circuit stated "We must respectfully disagree," and, without any further explanation, held that the timeliness of the disclaimer for federal tax purposes was measured from the creation of the trust rather than from the death of the life beneficiary (A-4, A-5). In his dissent Judge Harris pointed out the resultant split between holdings of the two Circuits, and argued that the majority should have followed *Keinath* and *Cottrell* (A-6).

Nationwide uniformity in the application of federal tax law is a matter of great importance. This Court should act to resolve the direct conflict between the decisions of the two Circuit Courts of Appeals created by the Ninth Circuit's decision.

## II. The Ninth Circuit's Decision Creates a Federal Rule of Disclaimer Which is in Conflict with the Law of More Than 27 States and Which Finds No Support in the Laws of Any State.

The statutes of at least 27 states expressly provide that disclaimers of contingent remainder interests can be made

before the expiration of a certain period of time (generally six or nine months) after the death of the life beneficiary.[1] Other states, as a matter of common law, have adopted the same principle. E.g., *Coleman v. Burns*, 103 N.H. 313, 171 A.2d 33 (1961) (New Hampshire). Page, Law of Wills, §49.8 (Bowe-Parker ed. 1962).

The Ninth Circuit's assertion that the timeliness of a remainderman's disclaimer must be measured from the creation of the remainder interest rather than the death of the life beneficiary finds no support in state law or, as noted above, in the law of other Circuits. The Eighth Circuit could find no such authority, *Keinath v. Commissioner*, *supra*, 480 F.2d at 64, and the Ninth Circuit did not cite a single case, statute or secondary authority to support its conclusion. (A-4, A-5).

Until the decision below, persons contemplating a disclaimer of a contingent remainder interest could reasonably wait until the death of the life beneficiary before deciding whether to disclaim. No federal statute or regulation expressly conflicted with that principle,[2] and until 1978 the only decision of the Tax Court to the contrary had been reversed on that precise issue by the Eighth Circuit in *Keinath*.

The Ninth Circuit has judicially created a rule so removed from state law that Jewett, who justifiably believed that his disclaimer would not be a taxable gift, and who had not even reached the point at which a decision on a disclaimer had to be made, belatedly discovers that his disclaimer should have been made thirty years earlier, and in fact twenty years before Treasury Regulation §25.2511-1(c) was promulgated.

This Court should act to prevent the judicial creation of such a paradoxical and inequitable result, and to avoid such an unnecessary conflict between federal and state law concepts.

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[1] See statutes cited *infra* at App. A-32.

[2] The Tax Reform Act of 1976, P.L. 94-455, §2009(e)(2), did effect a material change as to contingent remainder interests created after 1976, as discussed *post* at 15.

## III. If the Conflict Between the Circuits is Not Resolved, A Substantial Volume of Major Tax Litigation Will Result and Uncertainty Over the Federal Tax Law Will Extend Into the Twenty-First Century.

A decision which reverses the rules which taxpayers have followed for over forty years and which conflicts with an unambiguous decision of a United States Court of Appeals rendered seven years ago is a matter of serious concern to taxpayers and tax practitioners alike, especially those within the jurisdiction of the Ninth Circuit or of the various Circuits which have not yet chosen between the Ninth Circuit and the Eighth Circuit positions. As Judge Harris recognized in his dissent:

> "... *Keinath v. C.I.R.*, 480 F.2d 57 (8th Cir. 1973), followed by the Eighth Circuit *en banc* in *Cottrell v. Commissioner*, _____ F.2d _____ (1980), has been the only precedent from a Court of Appeals since its decision in 1973. Numerous tax practitioners have undoubtedly relied on this opinion in advising as to the tax consequences of such acts as are involved in the instant case, and justifiably so." (A-6)

A number of other cases, appealable to various Circuit Courts of Appeals, are already pending in the Tax Court on this issue.[3] The number of disclaimants or potential disclaimants awaiting clarification of the law, or at least the position adopted in various Circuits, is limited only by the number of individuals throughout the country who are contingent remaindermen under trusts created prior to 1977.

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[3] *Eleanor A. Ooten Ward Clark v. United States*, T.C. docket no. 3152-79; *Adelaide C. Griswold v. United States*, T.C. docket no. 12976-79; *Eleanor C. Hallenbeck v. United States*, T.C. docket no. 12879-79; *James R. Houghton v. United States*, T.C docket no. 12878-79; *Amory Houghton, Jr. v. United States*, T.C. docket no. 12880-79.

For persons who have already disclaimed the importance of the issue may be staggering — it is the difference between paying no tax and being liable for a gift tax on property which they have never possessed, enjoyed, controlled or benefited from and which is by definition not available to them for payment of the gift tax liability in issue.

The Ninth Circuit may have thought that the Tax Reform Act of 1976, P.L. 94-455, described in part V *post* (p. 15) resolved this issue. However, it affects only interests created after December 31, 1976. P.L. 94-455, §2009(e)(2), 90 Stat. at 1896. Interests created prior to 1977 will still be governed by the law of *Keinath* or the law of this case, depending on which rule other Circuits follow. Unless the conflict in the Circuits is resolved, it is reasonable to expect, in view of normal life expectancies and with the examples of the enviable longevity of the life beneficiaries in this case and in *Keinath*, that litigation under the pre-1976 law will continue to arise well into the twenty-first century.

## IV. The Ninth Circuit Incorrectly Held That a Disclaimer by a Contingent Remainderman During the Lifetime of the Life Beneficiary was a Taxable Gift.

### A. *The Ninth Circuit's Opinion Produces an Inconsistent and Anomalous Result.*

If Jewett had made his disclaimers at any time prior to 1958, even the Ninth Circuit would not have considered it to be a gift for federal tax purposes. Until then, the federal gift tax treatment of disclaimers was apparently straightforward — if a disclaimer was effective and timely under the governing state law it was not a taxable gift for federal tax purposes. *Brown v. Routzahn*, 63 F.2d 914 (6th Cir. 1933), *cert. denied*, 290 U.S. 641 (1933). In *Commissioner v. Vease's Estate*, *supra*, 314 F.2d at 88, the Ninth Circuit recognized the validity of that rule:

> "It was there [in *Brown v. Routzahn*] laid down that the federal tax on transfers ... is levied on the transfer of property; not on the exercise of a right to renounce testamentary gifts. Accordingly, if under local law a legatee or devisee has the option of accepting or rejecting his testator's bounty, rejection of the gift does not result in a taxable transfer to its residuary recipient. 314 F.2d at 88.

In 1958, Treasury Regulation §25.2511-1(c), 23 Fed. Reg. 8904 (11/15/58), was first published. The Ninth Circuit now concludes that the Regulation mandates that Jewett, who could have disclaimed without gift tax liability at anytime prior to 1958, now was unable to disclaim without paying a gift tax because he had not disclaimed in 1939 when the trust was created. That result is so unreasonable as to appear arbitrary. The Ninth Circuit's failure even to acknowledge the precedent it had established for itself in *Commissioner v. Vease's Estate, supra*, reinforces that suggestion of fundamental unsoundness.

### B. *The Ninth Circuit's Opinion Lacks the Reasoned Underpinnings of the Keinath Rule.*

In *Keinath v. Commissioner, supra*, the Eighth Circuit gave a thoroughly reasoned explanation for its holding. It noted there was no federal statute or regulation defining "reasonable time" and, accordingly, that federal courts could look to state law for guidance. 480 F.2d at 61. It found that Treasury Regulation §25.2511-1(c) imposed conditions which "are but a codification of common law principles applicable to the doctrine of disclaimer ...." 480 F.2d at 61.

After analyzing the applicable state disclaimer statute and other state statutes and precedents, the Eighth Circuit concluded that for federal gift tax purposes the reasonable time period for disclaimer commences only when the death of the life

beneficiary fixes the remainderman's interest in the testatrix's property. 480 F.2d at 64.[4]

In contrast, the reasoning of the Ninth Circuit Opinion appears to have been as follows:

1. A contingent remainder interest subject to divestiture is "property" the transfer of which would be subject to the gift tax. (A-2)

2. The federal standard of timeliness is imposed over and above state law requirements.(A-5)

3. Under federal law, the disclaimer had to be made within a reasonable time after the "transfer" (actually, the creation) of the contingent remainder interest to the disclaimant. (A-5)

Points 1 and 2 are correct but do not logically lead to point 3. In fact, there is no explanation whatsoever of the rationale for the holding in point 3. That lack of explanation is especially troubling because it contradicts the apparently plain language of Treasury Regulation §25.2511-1(c) that the "transfer" from which the reasonable time period runs is "the transfer to [the taxpayer] of *ownership of a decedent's property.*" (emphasis added) Giving these words their common meaning, a transfer of "ownership of the decedent's property" to the remainderman cannot take place until the death of the life beneficiary.

### C. *The Ninth Circuit's Opinion Confuses A Disclaimer With A Voluntary Transfer.*

The effect of the Ninth Circuit's opinion is to equate a disclaimer with a voluntary transfer. That equation obscures the fundamental difference between the two. In a voluntary transfer, the transferor selects the recipients of the property while in contrast a disclaimant does not control the further dis-

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[4] *See also, Estate of Rolin v. Commissioner*, 68 T.C. 919 (1977), aff'd, 588 F.2d 368 (2d Cir. 1978).

position of the property he has refused. As the Tax Court itself recognized,

> "... the Federal gift tax is concerned with *control* over the disposition of property and with exercises of the right to determine who should enjoy the fruits of ownership of property" (A-16), citing H.R. Rep. No. 708, 72d Cong., 1st Sess., 1939-1 C.B. (Part 2) 457, 476-77, S. Rep. No. 665, 72nd Cong., 1st Sess., 1939-1 C.B. (Part 2) 496, 524-525, and *Smith v. Shaughnessy*, 318 U.S. 176, 180 (1943) (emphasis added).

The selection of the recipients of the property by the donor is the essence of "control" over the property which results in a taxable gift. See *Estate of Sanford v. Commissioner*, 308 U.S. 39 (1939); *Richardson v. Commissioner*, 126 F.2d 562 (2d Cir. 1942).

In *Commissioner v. Vease's Estate*, 314 F.2d 79, 88 (9th Cir. 1963), the Ninth Circuit articulated the crucial distinction between a disclaimer and a voluntary transfer:

> It is one thing to say that a testamentary beneficiary may reject a part of his gift, ... without making a transfer to the residuary beneficiary. Leaving a larger estate to be shared by others need not constitute a transfer in any sense of the word. 314 F.2d at 88.

In the instant case the Ninth Circuit ignores its own careful articulation of this distinction. Here the persons who will receive the disclaimed property on the death of the last life beneficiary are fixed by the will of the testatrix, not by the terms of Jewett's disclaimers. Those disclaimers merely renounced any future right to receive the corpus of the trust; they did not and could not have purported to direct who would be entitled to receive it. In fact, even the identity of those ultimate recipients cannot be determined until the death of the last life beneficiary.

Jewett never exercised "control" over the disposition of the property and, therefore, did not "transfer" the testatrix's property.

### D. *The Ninth Circuit's Opinion Contravenes Congressional Intent That The Gift Tax Law Complement the Estate Tax.*

In interpreting a regulation which is not clear on its face, federal courts should look to the intent behind the statute the regulation is purporting to enforce. *Trustees of Indiana University v. United States*, 618 F.2d 736, 739 (Ct. Cl. 1980). "... [A] regulation must be interpreted so as to harmonize with ... and not to conflict with the objectives of the statute it implements." *Id. See United Telecommunications, Inc. v. Commissioner*, 589 F.2d 1383, 1390 (10th Cir. 1978), *cert. denied*, 442 U.S. 917 (1979); *Usery v. Kennecott Copper Corp.*, 577 F.2d 1113, 1118 (10th Cir. 1977).

The gift tax was originally adopted as a "corollary" or as "supplemental" to the estate tax. 65 Cong. Rec. 3119, 3120, 3122, 3172, 8095, 8096 (1924). The purpose of its enactment was "to prevent or compensate for avoidance of death taxes by taxing the gifts of property inter-vivos which, but for the gifts, would be subject ... to the tax laid upon transfers at death." *Estate of Sanford v. Commissioner*, 308 U.S. 39, 44 (1939). The intent of Congress was to achieve a "unified scheme of taxation of gifts whether made inter-vivos or at death." *Id.* at 48; R. Paul, *Federal Estate and Gift Taxation*, §15.04 (1942).

The federal gift tax and the federal estate tax "are *in pari materia* and must be construed together." *Estate of Sanford v. Commissioner*, 308 U.S. 39, 44 (1939). The federal gift tax, I.R.C. §2501, taxes "the transfer of property by gift"; the federal estate tax, I.R.C. §2033, taxes "all property to the extent of the interest therein of the decedent at the time of his death." If the taxpayer does not transfer property during his lifetime,

that "property" will remain in his estate, and be subject to the federal estate tax at his death.

It is well settled that a contingent remainder interest is not "property" includable in the remainderman's gross estate if he dies prior to the life beneficiary. *Estate of Williams v. Commissioner*, 62 T.C. 400 (1974). See also *C.A. Lee v. United States*, 63-1 USTC ¶12,128 (S.D. Tex. 1962).

If Jewett predeceased his mother, the testatrix's property would not have been subject to federal estate tax as part of his estate because her property never came into his estate. Similarly, Jewett's disclaimer will prevent the testatrix's property from ever coming into his estate. In either circumstance the testatrix's property will pass to others in accordance with the terms of her will. Yet the Ninth Circuit would impose a gift tax in the one instance (disclaimer) while no estate tax would be imposed in the event of Jewett's death.

Instead of creating "a unified scheme of taxation," the Ninth Circuit's opinion creates confusion and disharmony between the estate and gift taxes.

## V. The Ninth Circuit Decision Would Give Impermissible Retroactive Effect to a Statute Which Congress Intended to be Prospective Only.

Under the Tax Reform Act of 1976, P.L. 94-455, 90 Stat. 1520, Congress added Section 2518 to the Internal Revenue Code, which dealt specifically with the question of the timeliness of disclaimers. However, that new section is effective only as to interests created after December 31, 1976. P.L. 94-455, §2009(e)(2), 90 Stat. at 1896. The Committee Reports indicate that Congress recognized *Keinath* as a statement of the law governing interests created before 1977. H.R. Rep. No. 1380, 94th Cong., 2d Sess. 66, reprinted in 1976 *U.S. Code Cong. & Admin. News*, Vol. 4, 3420.

Judge Harris in his dissent expressly articulated the problem of retrospectivity that the majority decision created:

> "The Congress, in the Tax Reform Act of 1976, acted to override the *Keinath* rule, but only prospectively. The effect of the decision of the majority is to give to the 1976 Amendments the retrospective effect which the Congress expressly rejected." (A-6)[5]

By rejecting the application of the *Keinath* rule to a pre-1977 trust, the Ninth Circuit contravened the Congressional intent that its amendment of the law in response to *Keinath* be applied prospectively only.

## CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on December 9, 1980.

Dated: March 24, 1981.

Respectfully submitted,

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[5] Petitioners disagree with Judge Harris' assertion that the Tax Reform Act of 1976 overrode *Keinath*. Even if it did, however, the new rule was manifestly prospective only.

## APPENDIX

Filed: Dec. 9, 1980

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 78-3621

GEORGE F. JEWETT, JR., AND
LUCILLE M. JEWETT,
PETITIONERS-APPELLANTS,

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT-APPELLEE.

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ON PETITION TO REVIEW A DECISION OF THE
TAX COURT OF THE UNITED STATES

Argued and submitted November 12, 1980

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Before:
BROWNING and MERRILL, *Circuit Judges*,
and HARRIS,* *District Judge*

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### OPINION

MERRILL, *Circuit Judge*:

This is an appeal from a decision of the Tax Court holding that appellant George F. Jewett, Jr., made taxable gifts when he executed disclaimers of his remainder interest in a testamentary trust.[1] We affirm.

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* Honorable Oren Harris, Senior United States District Judge of the Eastern and Western Districts of Arkansas, sitting by designation.

[1] Lucille M. Jewett elected to consent to treat the gifts made by her husband, George F. Jewett, Jr., during the taxable year 1972 as having been made by both husband and wife to the extent allowed by law. She is therefore an appellant in this action.

The facts are not in dispute. Appellant's grandmother, Margaret Jewett, a resident of Massachusetts, died in 1939, and by her will created a trust with income to go to her husband, James, during his lifetime, and thereafter to her son, George, and his wife, Mary, during their respective lifetimes. Mary is now the sole surviving life tenant. When she dies, Margaret Jewett's will provides for distribution of the trust corpus in equal shares to the children of George and Mary then living. Appellant George F. Jewett, Jr., is one of those children. In 1972, he executed two disclaimers, the first for 95 percent and a later one for the remaining 5 percent of his interest in the trust remainder. The parties have stipulated that appellant thus had no share in the trust remainder after December 14, 1972.

The issue in this case is whether these disclaimers are subject to gift tax under applicable law. 26 U.S.C. §2501 provides in part: "A tax * * * is hereby imposed * * * on the transfer of property by gift * * *."

Section 2511(a) makes it clear that the tax imposed by §2501 is to cover all types of property interests. The tax "shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible * * *." A contingent remainder subject to divestiture, such as appellant's, is not excepted.

Treas.Reg. §25.2511-1(c) reads in part:

> "(c) The gift tax also applies to gifts indirectly made. Thus all transactions whereby property or property rights or interests are gratuitously passed or conferred upon another, regardless of the means or device employed, constitute gifts subject to tax. See further § 25.2512-8. Where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent (whether the transfer is effected by the decedent's will or

by the law of descent and distribution of intestate property), a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocable [*sic*] and effective under the local law. There can be no refusal of ownership of property after its acceptance. Where the local law does not permit such a refusal, any disposition by the beneficiary, heir, or next-of-kin whereby ownership is transferred gratuitously to another constitutes the making of a gift by the beneficiary, heir, or next-of-kin."[2]

It is undisputed that the disclaimer was effective under Massachusetts law, the law governing the administration of the estate. The only question presented is whether the disclaimer was made within a reasonable time after knowledge of the transfer. This, in turn, depends on our con-

[2] Although it is only applicable to transfers creating an interest in the person disclaiming made after December 31, 1976, the Tax Reform Act of 1976, Pub.L. No. 94-455, §2009 (26 U.S.C. §2518) adopts the substance of Treas.Reg. §25.2511-1(c), and in the interest of uniformity substitutes nine months for the "reasonable" standard of timeliness. It provides in part:

"(a) General Rule.—For purposes of this subtitle, if a person makes a qualified disclaimer with respect to any interest in property, this subtitle shall apply with respect to such interest as if the interest had never been transferred to such person.

(b) Qualified disclaimer defined.—For purposes of subsection (a), the term 'qualified disclaimer' means an irrevocable and unqualified refusal by a person to accept an interest in property but only if—

(1) such refusal is in writing,

(2) such writing is received by the transferor of the interest, his legal representative, or the holder of the legal title to the property to which the interest relates not later than the date which is 9 months after the later of—

(A) the day on which the transfer creating the interest in such person is made, or

(B) the day on which such person attains the age 21,

(3) such person has not accepted the interest or any of its benefits, * * *"

struction of the word "transfer." If it refers to the date when the interest created by the trust was established, the disclaimer clearly was not timely. If "transfer" means the acquisition of a vested interest by virtue of the death of the life beneficiary, then the disclaimer was timely, since the life tenant is still living.

Appellants contend that a disclaimer valid and effective under state law is not a taxable transfer for federal gift tax purposes and that the "reasonable time" to which the regulation refers is measured from the time when the remainderman comes into his right to possess and control the property—in this case, after the death of the life beneficiary. Appellants rely on *Keinath* v. *C.I.R.*, 480 F.2d 57 (8th Cir. 1973).[3]

In *Keinath*, the court characterized the requirements of the regulation that the disclaimer be unequivocal and effective under local law, and that it be made within a reasonable time as "but a codification of common law principles applicable to the doctrine of disclaimer." *Id.* at 61. Absent a federal statute or regulation defining "reasonable time," the court held that it must look to the law of the state for guidance. This inquiry led it to conclude that:

> "* * * under the prevailing common law and, in particular, the jurisdiction of the State of Minnesota the holder of a vested remainder interest subject to divestiture has a reasonable time within which to renounce or disclaim the remainder interest after the death of the life beneficiary and that an unequivocal disclaimer filed within six months thereof is made within a reasonable time."

*Id.* at 64. We must respectfully disagree.

State law does indeed generally recognize as valid a disclaimer of a contingent remainder if it is made within a

[3] *Keinath* has been recently followed by the Eighth Circuit *en banc* in *Cottrell* v. *Commissioner*, __ F.2d __ (1980). The question there was whether the rule in *Keinath* applied where the holder of a contingent remainder interest also had a general power of appointment. As to the issue before us, the holding of *Keinath* was not challenged, and was accepted by the court as controlling.

reasonable time after the remainder interest has vested unconditionally. Timeliness there relates only to the validity and effectiveness of the disclaimer. The federal regulation, however, has a different concern. It proceeds upon the assumption (actually, the requirement) that the disclaimer is valid under state law and thus has met the requirements of local law as to timeliness, whatever they may be. The question under the federal regulation, then, is not whether the disclaimer is valid, but whether, as a valid disclaimer, it is taxable as a gift. The timeliness requirement of the regulation is over and above the requirements of state law.

We hold that "transfer" as used in the regulation means the transfer to the disclaimant of the property interest disclaimed by him. In this case, that transfer took place in 1939 when the appellant received a contingent remainder from his deceased grandmother's estate. Appellant had "knowledge of the existence of [that] transfer" for approximately 33 years before he attempted to disclaim the property in 1972. For the purposes of the gift tax, we hold that the disclaimer was not made within a reasonable period of time.

Judgment affirmed.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 78-3621

GEORGE F. JEWETT, JR., AND
LUCILLE M. JEWETT,
PETITIONERS-APPELLANTS,

*v.*

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT-APPELLEE.

---

ON PETITION TO REVIEW A DECISION OF THE
TAX COURT OF THE UNITED STATES

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## DISSENT

HARRIS, *District Judge*, dissenting:

I respectfully dissent from the decision and opinion of the Court in this matter. In my view it is particularly important in matters of taxation that established precedent be followed, unless the Congress acts to change the rule as established or the rule be without substantial rational justification or foundation.

Were this a case of first impression I might well join with the majority. However, *Keinath* v. *C.I.R.*, 480 F.2d 57 (8th Cir. 1973), followed by the Eighth Circuit *en banc* in *Cottrell* v. *Commissioner*, __ F.2d __ (1980), has been the only precedent from a Court of Appeal since its decision in 1973. Numerous tax practitioners have undoubtedly relied on this opinion in advising as to the tax consequences of such acts as are involved in the instant case, and justifiably so.

The Congress, in the Tax Reform Act of 1976, acted to override the *Keinath* rule, but only prospectively. The effect of the decision of the majority is to give to the 1976 Amendments the retrospective effect which the Congress expressly rejected. An unnecessary split between holdings of the Circuit Courts of Appeal is thus established. I would follow the rule of *Keinath* and reverse.

70 T.C. No. 39

UNITED STATES TAX COURT

GEORGE F. JEWETT, JR., AND LUCILLE M. JEWETT,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT

Docket No. 3877-76. Filed June 13, 1978.

T held a 50 percent remainder interest in a testamentary trust established under the will of his grandmother, who died in 1939. T reached the age of majority in 1948. In 1972, when the surviving life tenant of the trust was 72 years old, T executed disclaimers of portions of his remainder interest which were unequivocal and effective under Massachusetts law. *Held*, the disclaimers were not made within a reasonable time as required by section 25.2511-1(c), Gift Tax Regs. *Keinath v. Commissioner*, 58 T.C. 352, reversed 480 F.2d 57 (C.A. 8), followed.

*Robert J. Richards, Jr.*, for the petitioners.

*Willard J. Frank* and *Charles W. Maurer, Jr.*, for the respondent.

## OPINION

RAUM, *Judge:* The Commissioner determined the following deficiencies in petitioners' Federal gift tax:

| Petitioner | Calendar Quarter Ending | Deficiency |
|---|---|---|
| George F. Jewett, Jr. | Sept. 30, 1972 | $398,065.39 |
| George F. Jewett, Jr. | Dec. 31, 1972 | 23,288.48 |
| Lucille M. Jewett | Sept. 30, 1972 | 310,613.94 |
| Lucille M. Jewett | Dec. 31, 1972 | 19,363.06 |

The only issue presented is whether George F. Jewett, Jr., made taxable gifts when he executed disclaimers of portions of his remainder interest in a certain testamentary trust.

Petitioners George F. Jewett, Jr., and Lucille M. Jewett, husband and wife, resided in Ross, California, at the time their petition in this action was filed. Petitioner George F. Jewett, Jr., filed his United States Gift Tax Returns for the calendar quarters ending September 30, 1972, and December 31, 1972, with the Internal Revenue Service Center in Fresno, California. Petitioner Lucille M. Jewett elected to consent to treat the gifts made by her husband during the taxable year 1972 as having been made by both husband and wife to the extent allowed by law and filed her United States Gift Tax Returns for the calendar quarters ending September 30, 1972, and December 31, 1972, with the Internal Revenue Service Center in Fresno, California. Since Petitioner Lucille M. Jewett is a party to this action solely by virtue of her consent to treat part of her husband's gifts as her own, George F. Jewett, Jr., will hereinafter be referred to as the petitioner.

Margaret Weyerhaeuser Jewett, petitioner's grandmother, died on January 14, 1939, a resident of Falmouth, Massachusetts. She left a will which was duly admitted to probate (Barnstable Probate No. 27161). Clause Eighth of said will created a trust (the "Trust") for the benefit of the testatrix's husband, James R. Jewett, during his lifetime and thereafter for the benefit of the testatrix's son, George F. Jewett, and George's wife, the testatrix's daughter-in-law, Mary Cooper Jewett (now Mary J. Gaiser), for their lives. The Trust, having been established under the Will of Margaret Weyerhaeuser Jewett, a Massachusetts decedent, has a *situs* in Massachusetts. The Trustee serving at the present time is John F. Cogan, Jr., of Lexington, Massachusetts.

Mary Cooper Jewett (now Mary J. Gaiser), petitioner's mother, is the sole surviving life tenant of the Trust, inasmuch as James R. Jewett and George F. Jewett are now deceased.

She was born on March 7, 1901, and is still living. Petitioner, her son, was born on April 10, 1927, and is now living.

Under the terms of Clause Eighth of the Will of Margaret Weyerhaeuser Jewett, petitioner was entitled to a share of the Trust remainder (the "Trust Remainder") if he survived his mother. If he did not survive his mother, the share to which he would have been entitled if he had survived was to pass to his issue per stirpes.

On August 30, 1972, petitioner executed an instrument entitled "Estate of Margaret Weyerhaeuser Jewett/George F. Jewett, Jr. Disclaimer". Said instrument was recorded in the Barnstable Probate Court on September 5, 1972. The instrument stated, in part:

> WHEREAS, MARGARET WEYERHAEUSER JEWETT, late of Falmouth, County of Barnstable, Commonwealth of Massachusetts, died on January 14, 1939, leaving a will which was proved and allowed by the Probate Court of said County on February 14, 1939, and
>
> WHEREAS, CLAUSE EIGHTH of said will created a trust for the benefit of her husband, JAMES R. JEWETT, during his lifetime and thereafter for the benefit of her daughter-in-law, MARY C. JEWETT (now MARY C. GAISER), and her son, GEORGE F. JEWETT (now deceased), and
>
> WHEREAS, discretionary payments of income are now being made to MARY C. GAISER pursuant to the provisions of Subparagraph 3 of Paragraph B of said CLAUSE EIGHTH by the Trustees of the aforesaid, and
>
> WHEREAS, the undersigned, as a son of MARY C. GAISER and the late GEORGE F. JEWETT, has an interest in fifty percent (50%) of the trust estate, including accumulations of income transferred to principal under the provisions of Paragraph B of CLAUSE NINTH provided that he survives said MARY C. GAISER, and

WHEREAS, the undersigned wishes to renounce his right to receive ninety-five percent (95%) of the aforesaid fifty percent (50%) of the remainder of the trust estate upon the death of MARY C. GAISER (but not including the right to receive fifty percent (50%) of the accumulations of income, if any there be, occurring after the execution of this disclaimer).

NOW, THEREFORE, the undersigned, said GEORGE F. JEWETT, JR., hereby irrevocably renounces and disclaims his right, if any, to ninety-five percent (95%) of the aforesaid fifty percent (50%) of the trust estate upon termination, provided, however, that this disclaimer shall not act upon any interest he may have in any accumulations of income which may occur after the date set forth below.

Petitioner had no interest in that portion of the Trust Remainder described in the instrument, from and after August 30, 1972.

On December 14, 1972, petitioner executed an instrument, in the same form as that executed August 30, 1972, by which he disclaimed his remaining 5 percent interest in one-half of the Trust Remainder. This second instrument was recorded in the Barnstable Probate Court on December 21, 1972. The parties have stipulated that petitioner had no interest in the Trust Remainder from and after December 14, 1972.

The value of the entire Trust corpus on August 30, 1972, was $7,912,393.63, and on December 14, 1972, was $8,398,038.37.

On their United States Gift Tax Returns for the calendar quarters ending September 30, 1972, and December 31, 1972, petitioners notified the Commissioner of the execution of the two disclaimers, but did not report as gifts any amount in respect of the Trust Remainder. The Commissioner determined that petitioner's execution of disclaimers of 95 and 5 percent,

respectively, of his 50 percent interest in the Trust Remainder constituted taxable gifts of those interests in the Trust Remainder, and determined deficiencies accordingly.

Section 2501, I.R.C. 1954, imposes a tax upon the transfer of property by gift, and the only question presented by this case is whether petitioner's execution of disclaimers of portions of his interest in the Trust Remainder constituted transfers of property by gift subject to the gift tax. See section 2511. The answer to this question is to be found in the proper interpretation of section 25.2511-1(c), Gift Tax Regs., which provides in pertinent part as follows:

Sec. 25.2511-1 Transfers in general.

* * * * * * *

(c) The gift tax also applies to gifts indirectly made. Thus, all transactions whereby property or property rights or interests are gratuitously passed or conferred upon another, regardless of the means or device employed, constitute gifts subject to tax. * * * Where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent (whether the transfer is effected by the decedent's will or by the law of descent and distribution of intestate property), *a refusal to accept ownership does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer.* The refusal must be unequivocable [sic] and effective under the local law. There can be no refusal of ownership of property after its acceptance. Where the local law does not permit such a refusal, any disposition by the beneficiary, heir, or next-of-kin whereby ownership is transferred gratuitously to another constitutes the making of a gift by the beneficiary, heir, or next-of-kin. In any case where a refusal is purported to relate to only a part of the prop-

> erty, the determination of whether or not there has been a complete and unqualified refusal to accept ownership will depend on all of the facts and circumstances in each particular case, taking into account the recognition and effectiveness of such a purported refusal under the local law. In the absence of facts to the contrary, if a person fails to refuse to accept a transfer to him of ownership of a decedent's property within a reasonable time after learning of the existence of the transfer, he will be presumed to have accepted the property. * * * [Emphasis supplied.]

The regulation sets up two criteria by which to judge whether a disclaimer shall be treated as a taxable transfer of property by gift rather than a mere refusal to accept ownership of a tendered gift or bequest: first, the disclaimer must be unequivocal and effective under local law, in this case the law of Massachusetts; and second, the disclaimer must be executed within a reasonable time after knowledge of the existence of the transfer. *Fuller v. Commissioner* 37 T.C. 147, 155; *Keinath v. Commissioner*, 58 T.C. 352, 358-359, reversed on another ground, 480 F.2d 57 (C.A. 8); *Estate of Hoenig v. Commissioner*, 66 T.C. 471, 477. The Commissioner does not dispute petitioner's claim that the two disclaimers executed by petitioner were unequivocal and effective under Massachusetts law. Therefore, the only issue is whether petitioner's disclaimers were executed within a reasonable time of his learning of the existence of the transfer to him. This is an issue of Federal law not controlled by State law concepts of "reasonable time". *Fuller v. Commissioner*, *supra*, 37 T.C. at 155; *Estate of Hoenig v. Commissioner*, *supra*, 66 T.C. at 477.

Petitioner executed the two disclaimers in 1972, approximately 33 years after the death of his grandmother and the establishment of the Trust, and 24 years after he himself reached the age of 21. The Commissioner argues that the "reasonable time" in which petitioner could disclaim his interest in the Trust Remainder without incurring gift tax liabil-

ity should be measured from the time he reached the age of majority (1948) since that date is later than the date of the creation of his interest in the Trust Remainder, namely, the date of Margaret Weyerhaeuser Jewett's death (1939).[1] Petitioner does not dispute that the interval, so measured, was not "reasonable". Petitioner argues, however, that the "reasonable time" does not begin to run until petitioner's interest becomes possessory upon the death of the last surviving life tenant, and relies on the fact that he disclaimed prior to the death of his mother, the surviving life tenant. The narrow issue presented, then, is whether, under Federal law, the petitioner had a "reasonable time" *from the death of the last surviving life tenant* in which he could disclaim his interest in the Trust Remainder without thereby making a taxable gift.

In *Keinath v. Commissioner, supra*, 58 T.C. 352, reversed 480 F.2d 57 (C.A. 8), the petitioner was the remainderman of a trust set up by the will of his late father. His interest was vested, subject to divestiture only if he should predecease the life beneficiary. Less than two months after the death of the life beneficiary, he executed a disclaimer of his interest which was timely and effective under local (Minnesota) law. We held that disclaimer a taxable gift under sections 2511 and 2501, noting (58 T.C. at 359-360):

> For nearly 19 years Cargill knew that if he survived his mother he would receive at least one-half of the corpus of the trust. He also knew, because he was a trustee of the trust, that receipt of the trust assets would be beneficial rather than onerous. Petitioners brought out no factor at trial which prevented Cargill from making a disclaimer of the remainder within a reasonable time after the creation of the trust. We can only assume that his reason for

[1] We assume that petitioner knew about his remainder interest in the Trust at least by the time he reached his majority. In any event, petitioners, upon whom the burden rested, did not establish otherwise.

waiting to disclaim until his mother's death was his inability to determine whether he would prefer receiving the assets himself or permit his children to get them at the termination of the trust.

As we have noted previously, section 2511 was intended to reach broadly to gifts of every type. The exception from taxation for disclaimers was designed to permit a donee to avoid receiving an unwanted gift or bequest within a reasonable time after learning of the gift or bequest; it should not be used as an estate-planning and tax-avoidance tool. On the facts in this case, we believe that Cargill was reasonably required by the regulation to disclaim his interest in the trust within a reasonable time after its creation.

We think that our decision in *Keinath* was correct and that it controls the decision in this case. Petitioner was a remainderman of the Trust whose interest would be defeated only if he failed to outlive his mother, the last surviving life tenant of the Trust.[2] His remainder interest was created when his grandmother died and the Trust was established pursuant to her will. See *Smith v. Shaughnessy*, 318 U.S. 176, 180-181; *Robinette v. Helvering*, 318 U.S. 184, 187; *Helvering v. Campbell*, 313 U.S. 15, 22. From the time of its creation, that remainder interest was a valuable property interest, even though it was subject to contingencies and had not, as yet, become possessory;[3] had he assigned his interest without con-

[2] We do not regard it as important whether petitioner's interest would be considered, under Massachusetts law, a contingent remainder or a vested remainder subject to divestiture, because the economic reality is the same. See *Helvering v. Hallock*, 309 U.S. 106, overruling *Helvering v. St. Louis Union Trust Co.*, 296 U.S. 39, and *Becker v. St. Louis Union Trust Co.*, 296 U.S. 48, where the formal difference between a contingent remainder and a vested remainder subject to divestment had been held to be crucial.

[3] The value of petitioner's remainder interest was not, of course, equal to 50 percent of the value of the Trust corpus. Rather, it depended upon actuarial factors reflecting the various contingen-

sideration, the transfer would have been subject to the gift tax. *Commissioner v. Procter*, 142 F.2d 824, 826-827 (C.A. 4), certiorari denied 323 U.S. 756. At least as early as 1948, when he reached the age of majority, petitioner could have disclaimed his remainder interest if he did not desire to accept its benefits, but he waited some 24 years before taking that step. During those 24 years he had the opportunity to assess whether disclaimer would be "the most advantageous course to be pursued", *Estate of Hoenig v. Commissioner*, *supra*, 66 T.C. at 477, and whether "he would prefer receiving the assets himself or permit his children to get them at the termination of the trust". *Keinath v. Commissioner*, *supra*, 58 T.C. at 359. For 24 years, in sum, he possessed the power to decide the ultimate disposition of his share of the corpus of the Trust, a power which he relinquished when he executed the two disclaimers. But it is precisely upon the relinquishment of the power to control the disposition of property that the gift tax is laid. *Burnet v. Guggenheim*, 288 U.S. 280, 287; *Sanford's Estate v. Commissioner*, 308 U.S. 39, 43; *Smith v. Shaughnessy*, *supra*, 318 U.S. at 181; *Robinette v. Helvering*, *supra*, 318 U.S. at 186-187. We hold, therefore, that the two disclaimers constituted taxable transfers of petitioner's remainder interest in the Trust.

Petitioner relies primarily upon the decision of the Court of Appeals for the Eighth Circuit in *Keinath v. Commissioner*, 480 F.2d 57, reversing our decision in *Keinath*, *supra*.[4] The Eighth Circuit agreed with our holding that the definition

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cies. There was originally a dispute between the parties as to the actuarial factors to be used, but the respondent has conceded that the petitioner's position in this regard is correct. Accordingly, there is no longer any controversy between the parties as to the computation of the value of the remainder interest.

[4] Petitioner also relies upon *Brown v. Routzahn*, 63 F.2d 914 (C.A. 6), certiorari denied, 290 U.S. 641. That case interpreted provisions of the Revenue Act of 1921, and did not purport to consider the effect of the regulations which control the disposition of this case.

of "reasonable time" is a matter of Federal law, but went on to say, 480 F.2d at 61-62:

> In determining "reasonable time" and the related issue of when the reasonable time period commences, we perforce, absent a federal statute or regulation defining reasonable time, must look to the law of the states. We are not conclusively bound by the state law, but this is the only field to probe for legal decisions and discussions on the phrase "reasonable time" as used in the context of making valid disclaimers. [Fn. ref. omitted.]

The Court then relied heavily upon Minnesota law in determining that the "reasonable time" should be measured from the date of death of the last surviving life tenant. But we do not agree that State law necessarily provides an adequate guide to the resolution of the Federal question presented by this case. The Federal gift tax is concerned with control over the disposition of property and with exercises of the right to determine who should enjoy the fruits of ownership of property. H. Rep. No. 708, 72d Cong., 1st Sess., 1939-1 C.B. (Part 2) 457, 476-477; S. Rep. No. 665, 72d Cong., 1st Sess., 1939-1 C.B. (Part 2) 496, 524-525; *Smith v. Shaughnessy, supra*, 318 U.S. at 180. State law, by contrast, may respond to concerns such as the balancing of conflicting claims to property, see, e.g., *McGivney v. McGivney*, 7 N.E. 721 (Sup. Jud. Ct., Mass.); *Garfield* v. *White*, 92 N.E.2d 575, 579 (Sup. Jud. Ct., Mass.); *Town of Pepperell v. Whipple*, 100 N.E.2d 844, 847 (Sup. Jud. Ct., Mass.), and the protection of the rights of creditors and other third parties, see, e.g., *Oliver v. Wells*, 173 N.E. 676, 679 (Ct. Apps. N.Y.), and *In re Wilson's Estate*, 83 N.E.2d 852, 854-855 (Ct. Apps. N.Y.); cf. *Estate of Dreyer v. Commissioner*, 68 T.C. 275, 292-294. While a State court might be willing to accept a renunciation of a non-possessory interest after the passage of considerable time, so long as the interests of third parties have not been harmed, the passage of time is crucial to the scheme of the gift tax. With time, the potential recipient can wait to see if he himself needs the prop-

erty, or whether he had better let it pass directly to the next generation.

The petitioner further argues, however, that this Court has acquiesced in the reversal of *Keinath*. In *Estate of Rolin v. Commissioner*, 68 T.C. 919, 927, on appeal (C.A. 2), it was stated:

> Moreover, under New York law, the reasonable time for renunciation would not begin to run until the interest is indefeasibly fixed both in quality and quantity. [Citation]. The same rule has been recognized for Federal tax purposes. *Keinath v. Commissioner*, 480 F.2d 57 (8th Cir. 1973). Such a rule should be applied here.

In *Rolin*, however, a case that was not reviewed by the full Court, the question was whether the "reasonable time" for renunciation began to run upon the creation of a revocable inter vivos trust or at the death of the trust donor. It was held that the revocability of the trust meant that the donee's interest was not fixed until the power of revocation lapsed upon the death of the donor. Here, however, petitioner's interest became fixed upon the death of Margaret Weyerhaeuser Jewett, and remained fixed — if contingent — at all times thereafter. *Rolin* did not, therefore, address the issue presented by this case.

The petitioner attempts, finally, to distinguish this case from *Keinath*, but we find the proposed distinctions unconvincing. In *Keinath*, it is argued, the remainder interest was vested in the beneficiary seeking to disclaim it, while this petitioner held only a contingent remainder interest. Accepting the latter allegation as true, however, see note 2, *supra*, we do not regard it as controlling. The substance of the property transaction, not its form under archaic principles of property law, must control. *Helvering v. Hallock*, 309 U.S. 106, 116-118. Furthermore, it is argued, the disclaimer in *Keinath* was not complete and unequivocal because the disclaiming beneficiary acted "with the understanding" that the dis-

claimed property would pass in a certain manner. Brief for the Petitioner, at 14. It is true that the petitioner in *Keinath* sought a ruling from the Minnesota courts as to the disposition of the disclaimed remainder interest under State law. *Keinath* v. *Commissioner*, *supra*, 58 T.C. at 355. But he nonetheless made a valid and unequivocal disclaimer of his remainder interest, and the Minnesota court so held. *Keinath* v. *Commissioner*, *supra*, 58 T.C. at 356. And in any event, we think it irrelevant that petitioner herein, unlike the petitioner in *Keinath*, was willing to act upon his own understanding of the law which would apply to the disposition of his remainder interest following his disclaimer.

The petitioner possessed, for 24 years, the effective right to determine who should ultimately receive the benefits of a 50 percent remainder interest of a trust which, in 1972, had a corpus of approximately $8 million. He waited to act in respect of that remainder interest until the surviving life beneficiary was over 70 years of age and until he himself was 45 and, it appears, a man of substantial means.[5] In 1972, by the execution of two disclaimers, he elected to let the property pass according to the alternative provisions of his grandmother's will — to the natural objects of his bounty. This, we hold, was an exercise of control over the disposition of property subject to the gift tax imposed by section 2501.

Finally, we note that section 2009(b) of the Tax Reform Act of 1976, Pub. L. 94-455, 90 Stat. 1893, added a new section 2518 to the gift tax provisions of the Code. Section 2518 lays out specific standards for determining when a disclaimer constitutes a taxable gift, and would support the Commissioner's position here if the disclaimers had been executed after its effective date. Moreover, the legislative history strongly indicates that Congress disapproved of the result reached by the Eighth Circuit in *Keinath* insofar as it permitted a tax-free

[5] Petitioner's gift tax returns disclose that he made taxable gifts of $2,751,502 between 1958 and 1972, not including the interests in the Trust here at issue.

disclaimer to be made 19 years after the creation of a remainder interest in a testamentary trust. See H. Rep. No. 94-1380, 94th Cong., 2d Sess. 66, 1976-3 C.B. (Volume 3) 800. We think that section 2518 was intended to make sure that no such result would thereafter be reached and that it was certainly not intended to approve a contrary interpretation of the statute as it existed prior to the amendment. Cf. *Knetsch v. United States*, 364 U.S. 361, 367-369.

To reflect the Commissioner's concession in respect of valuation of the remainder interest,

*Decision will be entered under Rule 155.*

Reviewed by the Court.

UNITED STATES TAX COURT

Docket No. 3877-76

GEORGE F. JEWETT, JR. and
LUCILLE M. JEWETT,
PETITIONERS,
v.
COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

## STIPULATION OF FACTS

The parties hereby stipulate and agree that for the purpose of this case the following facts and exhibits attached hereto and made a part hereof may be taken as true, subject to the rights of the parties to introduce other and further evidence not inconsistent with this stipulation and preserving the parties' rights to object, at the time of trial, to any and all portions of said stipulation and attached exhibits as they may deem to be irrelevant or immaterial:

1. George F. Jewett, Jr. and Lucille M. Jewett, the petitioners herein, are husband and wife and resided at Skyland Way, Ross, California 94957.

2. Petitioner George F. Jewett, Jr. filed his United States Gift Tax Returns for the calendar quarters ending September 30, 1972 and December 31, 1972, with the Internal Revenue Service Center in Fresno, California. Attached hereto and made a part hereof are the originals of said returns marked Exhibits 1-A and 2-B, respectively.

3. Petitioner Lucille M. Jewett elected to consent to treat the gifts made by petitioner George F. Jewett, Jr. during the taxable year 1972 as having been made by both husband and wife to the extent allowed by law and filed her United States Gift Tax Returns for the calendar quarters ending September 30, 1972 and December 31, 1972, with the Internal Revenue Service Center in Fresno, California. Attached hereto and

made a part hereof are copies of said returns marked as Exhibits 3-C and 4-D, respectively.

4. Margaret Weyerhaeuser Jewett, late of Falmouth, Massachusetts, died on January 14, 1939, leaving a will which was duly admitted to probate (Barnstable Probate No. 27161). Attached hereto and made a part herof is a copy of said will marked Exhibit 5-E.

5. Clause Eighth of said will (Exhibit 5-E) created a trust for the benefit of the testatrix's husband, James R. Jewett, during his lifetime and thereafter for the benefit of the testatrix's son, George F. Jewett, and his wife, the testatrix's daughter-in-law, Mary Cooper Jewett (now Mary J. Gaiser).

6. The trust, having been established under the Will of Margaret Weyerhaeuser Jewett, a Massachusetts decedent, has a *situs* in Massachusetts. The presently serving Trustee is John F. Cogan, Jr. of Lexington, Massachusetts.

7. James R. Jewett and George F. Jewett are now deceased. Mary Cooper Jewett (now Mary J. Gaiser) was born on March 7, 1901 and is now living.

8. Petitioner George F. Jewett, Jr., a child of the testatrix's son George F. Jewett and the said Mary Cooper Jewett (now Mary J. Gaiser) was born on April 10, 1927 and is now living.

9. Under the terms of Clause Eighth of the Will of Margaret Weyerhaeuser Jewett (Exhibit 5-E), if petitioner George F. Jewett, Jr. survived his mother, Mary Cooper Jewett (now Mary J. Gaiser), he would become entitled to a share of the trust remainder. If he did not survive his mother, Mary Cooper Jewett (now Mary J. Gaiser), he would not become so entitled.

10. On August 30, 1972 petitioner George F. Jewett, Jr. executed an instrument entitled:

Estate of Margaret Weyerhaeuser Jewett
George F. Jewett, Jr. Disclaimer

Said instrument was recorded in the Barnstable Probate Court on September 5, 1972. Petitioner George F. Jewett had no interest in that portion of the trust remainder described in said

instrument, from and after August 30, 1972. Attached hereto and made a part hereof is a copy of said instrument marked Exhibit 6-F.

11. On December 14, 1972 petitioner George F. Jewett, Jr. executed an instrument entitled:

Estate of Margaret Weyerhaeuser Jewett
George F. Jewett, Jr. Disclaimer #2

Said instrument was recorded in the Barnstable Probate Court on December 21, 1972. Petitioner George F. Jewett, Jr. had no interest in the trust remainder from and after December 14, 1972. Attached hereto and made a part hereof is a copy of said instrument marked Exhibit 7-G.

12. The value of the entire trust corpus on August 30, 1972 was $7,912,393.63.

13. The value of the entire trust corpus on December 14, 1972 was $8,398,038.37.

14. The actuarial factor employed by respondent in his notice of deficiency for the asserted August 30, 1972 gift was based on Table LN with interest at 6 percent and was 0.50533.

15. The actuarial factor employed by respondent in his notice of deficiency for the asserted December 14, 1972 gift was based on Table LN with interest at 6 percent and was 0.50079.

(s) ROBERT J. RICHARDS, JR. Date: Oct. 21, 1977
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By: _____ Date: _____
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UNITED STATES TAX COURT
Washington, D.C. 20217

Docket No. 3877-76

GEORGE F. JEWETT, JR. and
LUCILLE M. JEWETT,
PETITIONERS,

*v.*

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

## ORDER

The Court filed its opinion in this case on June 13, 1978. On July 14, 1978, the Court received from the petitioners a "Motion for Reconsideration of Findings and Opinion" under Rule 161, Tax Court Rules of Practice and Procedure. The opinion and findings have been reconsidered in light of petitioners' motion and their memorandum of law in support thereof, and no basis has been found to change the result reached therein.

It is noted, among other things, that petitioners complain that the opinion is violative of *Estate of Sanford* v. *Commissioner*, 308 U.S. 39, and that they make a related contention that the opinion fails to consider the argument in their brief in respect of the Federal estate tax laws. These matters, however, were considered, and it was concluded that the gift tax clearly applies to the gratuitous transfer of valuable property rights notwithstanding the fact that such rights, like a simple life estate, might under certain circumstances terminate on or before the death of the donor and therefore escape inclusion in the gross estate. Petitioners' argument in this respect was found so lacking in merit in light of the Supreme Court's later opinion in *Smith* v. *Shaughnessy*, 318 U.S. 176, 178-181, that it warranted no discussion. See also *Commissioner* v. *Procter*, 142 F. 2d 824, 826-827 (C.A. 4).

In order to clarify the Court's opinion in other respects it is hereby

ORDERED:

1. In the first full sentence on page 10, the word "possessory" is deleted and replaced by the phrase "indefeasibly vested".

2. In the sentence beginning on page 14 and continuing onto page 15, the phrase "non-possessory interest" is deleted and replaced by the phrase "non-possessory and not-indefeasibly-vested property interest."

3. On page 15, the last two sentences are deleted and the following is inserted in their place:

> Here, however, petitioner's interest became fixed, in the sense in which that word was used in *Rolin*, upon the death of Margaret Weyerhaeuser Jewett. At that point, the testatrix's power of revocation ceased and petitioner's interest under her will was no longer subject to her unfettered discretion. See *Sanford's Estate* v. *Commissioner*, *supra*, 308 U.S. at 43-44. Moreover, petitioner's interest was, at the death of Margaret Weyerhaeuser Jewett, "fixed both in quality and quantity" as required by *Rolin*. His interest was a remainder interest (quality) in 50 percent of the corpus of a trust (quantity), which interest would become indefeasibly vested, and possessory, only if he survived the last surviving life tenant. We regard it as irrelevant under *Rolin* that, as with any remainder interest, the present dollar value of petitioner's interest, being dependent upon actuarial factors, would fluctuate over time.

4. The sentence beginning on page 17 and continuing onto page 18 is amended to read as follows:

> The new provisions, which were made prospective only (see section 2009(e)(2) of the 1976 Act), lay out specific standards for determining when a disclaimer constitutes a taxable gift, and would support the Commissioner's position here if the disclaimers here were subject to its provisions.

5. The Court's opinion remains in all other respects unchanged.

(s) ARNOLD RAUM
ARNOLD RAUM, Judge

Dated: Washington, D.C.
July 19, 1978

UNITED STATES TAX COURT
Washington, D.C. 20217

Docket No. 3877-76

GEORGE F. JEWETT, JR. and
LUCILLE M. JEWETT,
PETITIONER,

*v.*

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

ORDER

On July 14, 1978, petitioners filed a Motion for Reconsideration of Findings and Opinion. The opinion referred to in the motion was reviewed by the Tax Court and adopted pursuant to section 7460(b), I.R.C. of 1954. Insofar as petitioners' motion may be interpreted as a motion for reconsideration by the Court pursuant to that section, it is

ORDERED that the motion is denied.

(s) C. MOXLEY FEATHERSTON
C. MOXLEY FEATHERSTON
Chief Judge

Dated: Washington, D.C.
July 19, 1978

UNITED STATES TAX COURT

Docket No. 3877-76

GEORGE F. JEWETT, JR. and
LUCILLE M. JEWETT,
PETITIONERS,

*v.*

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT.

## DECISION

Pursuant to the opinion of the Court filed June 13, 1978, and incorporating herein the facts recited in the respondent's computation as the findings of the Court, it is

ORDERED AND DECIDED: That there are deficiencies in gift taxes due from the petitioner, George F. Jewett, Jr., for the calendar quarters ended September 30, 1972 and December 31, 1972, in the amounts of $381,729.84 and $23,288.48, respectively; and

That there are deficiencies in gift taxes due from the petitioner, Lucille M. Jewett, for the calendar quarters ended September 30, 1972 and December 31, 1972, in the amounts of $297,047.13 and $19,363.06, respectively.

(Signed) ARNOLD RAUM
Judge

Entered Aug 17 1978

* * * * *

It is hereby stipulated that the foregoing decision is in accordance with the opinion of the court and the respondent's computation, and that the Court may enter this decision, without prejudice to the right of either party to contest the correctness of the decision entered herein.

(s) ROBERT J. RICHARDS, JR. Date: August 4, 1978
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By: (Sgd) ROBERT B. DUGAN Date: Aug 11 1978
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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No. 78-3621

GEORGE F. JEWETT, JR., AND
LUCILLE M. JEWETT,
PETITIONERS-APPELLANTS,

*v.*

COMMISSIONER OF INTERNAL REVENUE,
RESPONDENT-APPELLEE.

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Before:
BROWNING and MERRILL, *Circuit Judges*,
and HARRIS,* *District Judge*

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ORDER

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Browning has voted to reject the suggestion for a rehearing and Judges Merrill and Harris have recommended such rejection.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

The motion of Theodore W. Hirsh and Donald R. Mering to file brief as amicus curiae, etc., is hereby denied. The motion of Wallace B. Liverance, Jr., and Geoffrey J. O'Connor for leave to file brief as amicus curiae is hereby denied. The motion of Adelaide C. Griswold, James R. Houghton, Amory Houghton, Jr., and Eleanor C. Hallenbeck for leave to file brief as amici curiae is hereby denied.

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* Honorable Oren Harris, Senior United States District Judge of the District of Arkansas, sitting by designation.

Treasury Regulation §25.2511-1 *Transfers in general:*

* * *

(c) The gift tax also applies to gifts indirectly made. Thus, all transactions whereby property or property rights or interests are gratuitously passed or conferred upon another, regardless of the means or device employed, constitute gifts subject to tax. See further §25.2512-8. Where the law governing the administration of the decedent's estate gives a beneficiary, heir, or next-of-kin a right to completely and unqualifiedly refuse to accept ownership of property transferred from a decedent (whether the transfer is effected by the decedent's will or by the law of descent and distribution of intestate property), a refusal to accept ownership does not constitute the making of a gift if the refual is made within a reasonable time after knowledge of the existence of the transfer. The refusal must be unequivocable [sic] and effective under the local law. There can be no refusal of ownership of property after its acceptance. Where the local law does not permit such a refusal, any disposition by the beneficiary, heir, or next-of-kin whereby ownership is transferred gratuitously to another constitutes the making of a gift by the beneficiary, heir, or next-of-kin. In any case where a refusal is purported to relate to only a part of the property, the determination of whether or not there has been a complete and unqualified refusal to accept ownership will depend on all of the facts and circumstances in each particular case, taking into account the recognition and effectiveness of such a purported refusal under the local law. In the absence of facts to the contrary, if a person fails to refuse to accept a transfer to him of onwership of a decedent's property within a reasonable time after learning of the existence of the transfer, he will be presumed to have accepted the property. In illustration, if Blackacre was devised to A under the decedent's will (which also provided that all lapsed legacies and devices shall go to B, the residuary beneficiary), and under local law A could refuse

to accept ownership in which case title would be considered as never having passed to A, A's refusal to accept Blackacre within a reasonable time of learning of the devise will not constitute the making of a gift by A to B. However, if a decedent who owned Greenacre died intestate with C and D as his only heirs, and under local law the heir of an intestate cannot, by refusal to accept, prevent himself from becoming an owner of intestate property, any gratuitous disposition by C (by whatever term it is known) whereby he gives up his ownership of a portion of Greenacre and D acquires the whole thereof constitutes the making of a gift by C to D.

Footnote 1: State Disclaimer Statutes:

Alaska: Alaska Stats. §§13.06.005 to 13.36.100.
Arizona: Ariz. Rev. Stats. §§14-1101 to 14-7307.
Arkansas: Ark. Stats. §62-3202(b).
California: West's Ann. Civ. Code §190.3(a).
Colorado: Col. Rev. Stats. 1973 §§15-10-101 to 15-17-101.
Florida: West's F.S.A. §§731.005 to 735.302.
Georgia: Ga. Code Ann. §113-824(b).
Hawaii: Laws 1976, No. 200.
Idaho: Ida. Code §§15-1-100 to 15-7-307.
Illinois: S.H.A. c. 110 ½ §2-7.
Indiana: Ind. Code §29-1-6-4(b).
Iowa: Iowa Code §633.704(2)(a).
Kansas: Kans. Stats. Ann. §59-2292.
Kentucky: Ken. Rev. Stats. Ann. §394.620(2).
Maine: 18 Maine Rev. Stats. Ann. §1273(2); 18A Maine Rev. Stats. Ann. §2-801.
Massachusetts: Mass. Gen. Laws c. 191A, §3.
Minnesota: Minn. Stats. Ann. §§524.1-100 to 524.8-103.
Montana: Rev. Code Mont. 1947 §§91A-1-101 to 91A-6-104.
Nebraska: R.R.S. 1943 §§30-2201 to 30-2902.
New Mexico: 1953 Comp. §§32A-1-101 to 32A-7-401.
North Carolina: N.C. Gen. Stats. §31B-2(b).
North Dakota: No. Dak. Div. Code §§30.1-01-01 to 30.1-35-01.
Oregon: Oreg. Rev. Stats. §§14-1101 to 14-7307.
Texas: Tex. Probate Code §37A(a).
Utah: Utah Code Ann. 1953 §§75-1-101 to 75-8-101.
Virginia: Va. Code §64.1-189.
Washington: Rev. Code Wash. Ann. §11.86.030.